**COMMENT**
**to the**

**RULE 30(b)(6) SUBCOMMITTEE**
**of the**
**ADVISORY COMMITTEE ON CIVIL RULES**

# GIVE THEM SOMETHING TO TALK ABOUT: DRAFTING A RULE 30(b)(6) CONSULTATION REQUIREMENT WITH SUFFICIENT PARAMETERS TO ENSURE MEANINGFUL RESULTS

December 15, 2017

Lawyers for Civil Justice ("LCJ")[1] respectfully submits this Comment to the Rule 30(b)(6) Subcommittee ("Subcommittee") of the Advisory Committee on Civil Rules ("Committee").

## I. INTRODUCTION

The Subcommittee's decision to draft a directive requiring consultation at the time of a Rule 30(b)(6) deposition notice holds promise to curtail some of the well-known abuses of the rule. As the Subcommittee members observed, a provision that encourages meaningful discussion about the key details of a 30(b)(6) deposition could reduce the contentiousness that is too often associated with practice under this rule. Without more, however, a bare requirement of consultation will not achieve the Subcommittee's goals. That's because the consultation will not be meaningful unless both the sender and recipient of the notice have reason to engage seriously in a negotiation. The present rule, which fails to establish any parameters other than "reasonable particularity," does not provide an environment for the parties to engage in meaningful dialogue as to what might be discussed. If, for example, consultation involves a recipient suggesting that 140 topics is excessive for the needs of the case, the sender can end the "consultation" by simply

[1] Lawyers for Civil Justice ("LCJ") is a national coalition of corporations, law firms and defense trial lawyer organizations that promotes excellence and fairness in the civil justice system to secure the just, speedy and inexpensive determination of civil cases. For over 30 years, LCJ has been closely engaged in reforming federal civil rules in order to: (1) promote balance and fairness in the civil justice system; (2) reduce costs and burdens associated with litigation; and (3) advance predictability and efficiency in litigation. Although LCJ's corporate members are often defendants, they are plaintiffs as well. They not only respond to many discovery requests, they also seek discovery. They receive many 30(b)(6) notices but also, on occasion, serve them and expect meaningful compliance. LCJ wants Rule 30(b)(6), like the rest of the FRCP, to be fair and efficient for everyone, regardless of their position in any particular lawsuit.

disagreeing and proceed with the deposition because there is no standard, presumptive or otherwise, that such a large number of topics is too many. For this reason, the Subcommittee should draft and propose specific language listing key topics to be covered during the consultation so all parties to the consultation have reason to be at the table. In addition, establishing presumptive limits on the number of topics would provide guidance for the parties to ensure the tenets of proportionality and cooperation are met.

## II. ESTABLISHING PRESUMPTIVE LIMITS ON THE NUMBER OF TOPICS WOULD ENSURE PRODUCTIVE TWO-WAY CONSULTATION.

A common dispute concerning Rule 30(b)(6) concerns the number of topics included in a notice. A high number of topics frequently leads to back-and-forth finger pointing about too many poorly defined topics on the one hand, and inadequate preparation of witnesses on the other. Notices with more than 50 topics are commonplace.[2]

Because Rule 30(b)(6) contains no presumptive limits on the number of topics, parties to a consultation about a particular notice have little if any reason to reach an agreement as to the appropriate number of topics. There is nothing new or untested about presumptive limits, which are widely accepted and helpful in other categories of discovery. In fact, the same concerns that led the Committee to impose a presumptive numerical limit on interrogatories apply equally here.[3] A presumptive limit on the number of deposition topics would foster meaningful consultation while still allowing additional inquiry where appropriate. The presumptive limit should be 10.[4]

Defining Rule 30(b)(6)'s presumptive limit on topics would foster helpful discussions more broadly than on the discrete question alone. Case law is divided on whether an organization's representative witness can be forced to answer questions beyond the scope of the deposition notice,[5] and disputes about scope frequently result in rancor and efforts to punish responding

[2] *See, e.g.*, *Mondares v. Kaiser Found. Hosp.*, No. 10-CV-2676-BTM WVG, 2011 WL 5374613, at *1 (S.D. Cal. Nov. 7, 2011) (220 topics); *Nester v. Textron, Inc.*, No. A-13-CV-920 LY, 2014 WL 12631817, at *1 (W.D. Tex. Dec. 5, 2014) (110 topics); *Kingery v. Quicken Loans, Inc.*, No. 2:12-cv-01353, 2014 WL 1017180, at *1 (S.D. W. Va. Mar. 14, 2014) (93 topics); *Furminator, Inc. v. Munchkin, Inc.*, No. 4:08CV00367 ERW, 2009 WL 1176285, at *1 (E.D. Mo. May 1, 2009) (at least 85 topics); *Lenard v. Sherwin-Williams Co.*, No. 2:13-CV-2548 KJM AC, 2015 WL 854752, at *3 (E.D. Cal. Feb. 26, 2015) (more than 80 topics); *Hoffman v. L & M Arts*, No. 3:10-CV-0953-D, 2013 WL 655014, at *1 (N.D. Tex. Feb. 21, 2013) (80 topics).

[3] The same concerns of costliness, harassment, and curbing excessive discovery, which the advisory committee identified for the old Rule 33, are present here. *See* FED. R. CIV. P. 33(a) advisory committee's note (1993) ("[B]ecause the device can be costly and may be used as a means of harassment, it is desirable to subject its use to the control of the court consistent with the principles stated in Rule 26(b)(2). . . . The aim is not to prevent needed discovery, but to provide judicial scrutiny before parties make potentially excessive use of this discovery device.").

[4] *See* Lawyers for Civil Justice, "*Advantageous to Both Sides": Reforming the Rule 30(b)(6) Process to Improve Fairness and Efficiency for All Parties* 5-8 (July 5, 2017), http://www.lfcj.com/uploads/3/8/0/5/38050985/lcj_response_to_invitation_for_comment_on_rule_30_b__6__7-5-17.pdf, and Lawyers for Civil Justice, *Not Up To the Task: Rule 30(b)(6) and the Need for Amendments that Facilitate Cooperation, Case Management and Proportionality* 6-8 (Dec. 21, 2016), http://www.lfcj.com/uploads/3/8/0/5/38050985/lcj_comment_on_rule_30_b__6__12-21-2016.pdf.

[5] *Crawford v. Franklin Credit Mgmt. Corp.*, 261 F.R.D. 34, 38 (S.D.N.Y. 2009) (the stated areas of inquiry are the "minimum" about which the designated representative must speak, not the "maximum"); *Emps. Ins. Co. of Wausau v. Nationwide Mut. Fire Ins. Co.*, No. CV 2005-0620(JFB)(MD), 2006 WL 1120632, at *1 (E.D.N.Y. Apr. 26,

organizations and their counsel for being insufficiently prepared.[6] Navigating and negotiating the parameters of the deposition would reduce such disputes by encouraging both parties to focus on the information relevant to the merits of claims and defenses.

## III. SPECIFYING THE TOPICS TO BE ADDRESSED IS NECESSARY TO ENSURE MEANINGFUL CONSULTATION.

To be effective, a consultation requirement should include the specific issues to be addressed. Absent a particularized list, a new consultation requirement will leave practitioners without sufficient guidance about the goals and expectations. The following key subject matters should be included:

(1) the scope of corporate representative deposition topics;

(2) the length and timing of the depositions;

(3) the staging of the deposition relative to other discovery;

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2006) (scope of questions to 30(b)(6) witness is not defined by the notice but by Rule 26(b)(1)); *Green v. Wing Enters., Inc.*, No. 1:14-CV-01913- RDB, 2015 WL 506194, at *8 (D. Md. Feb. 5, 2015) (the scope of examination at a 30(b)(6) deposition is not limited to the areas of inquiry in the notice, but only by the scope of discovery under Rule 26, though answers to questions beyond the scope of the enumerated areas are individual testimony, not corporate testimony); *Fed. Trade Comm'n v. Vantage Point Servs., LLC.*, No. 15-CV-6S(SR), 2016 WL 3397717, at *2 (W.D.N.Y. June 20, 2016) (a 30(b)(6) witness may provide individual testimony about additional relevant topics, with the caveat that unless the witness is also an officer or managing agent of the firm, that testimony should not normally be considered to be offered on behalf of the corporation). *But see Soroof Trading Dev. Co. v. GE Fuel Cell Sys., LLC*, No. 10 CIV. 1391 LGS JCF, 2013 WL 1286078, at *4 (S.D.N.Y. Mar. 28, 2013) (party must notice deposition of witness personally and separately from 30(b)(6) notice if it seeks testimony in the witness's personal capacity); *E.E.O.C. v. Freeman*, 288 F.R.D. 92, 99 (D. Md. 2012) (questions beyond scope do not bind the company at all); *New Jersey Mfrs. Ins. Grp. v. Electrolux Home Prod., Inc.*, No. CIV. 10-1597, 2013 WL 1750019, at *3 (D.N.J. Apr. 23, 2013) (duty to prepare a witness is "limited to information called for by the deposition notice"); *State Farm Mut. Auto. Ins. Co. v. New HorizonT, Inc,*, 250 F.R.D. 203, 216 (E.D. Pa. 2008) ("[I]f a Rule 30(b)(6) witness is asked a question concerning a subject that was not noticed for deposition . . . the witness need not answer the question."); *King v. Pratt & Whitney, a Div. of United Techs. Corp.*, 161 F.R.D. 475, 476 (S.D. Fla. 1995) (if the examining party asks questions outside the scope of the matters described in the notice and if the deponent does not know the answer to questions outside the scope of the notice that is the examining party's problem).

[6] *See e.g.*, *QBE Ins. Corp. v. Jorda Enters.*, 277 F.R.D. 676, 700 (S.D. Fla 2012) (barring a company from testifying at trial on any matters on which the company's selected deponent had been unable or unwilling testify); *State Farm*, 250 F.R.D. at 217 (compelling additional testimony and granting monetary sanctions where a company failed to adequately prepare its designated representative for deposition); *Wausau Underwriters Ins. Co.* 310 F.R.D. 683, 687 (S.D. Fla. 2015) (barring a company from testifying at trial on any matters on which the company's selected deponent had been unable or unwilling testify); *Martin Cty. Coal Corp. v. Universal Underwriters Ins. Servs., Inc.*, No. 08-93-ART, 2010 WL 4629761, at *12 (E.D. Ky. Nov. 8, 2010) (threatening sanctions where a deponent was "unprepared"); *Clapper v. Am. Realty Inv'rs, Inc.*, No. 3:14-CV-2970-D (N.D. Tex. Nov. 9, 2016) (requiring a second deposition, at the deponent company's expense, where the deponent was unfamiliar with several areas of inquiry) (citing *Brazos River Auth. v. GE Ionics, Inc.*, 469 F.3d 416, 433 (5th Cir. 2006)). Taken together, this has the possible effect of requiring companies and their counsel to waste time and resources over-preparing a deponent to respond to inquiries that lack specificity in order to avoid later claims of and sanctions for inadequate preparation. *See e.g.*, *Crawford*, 261 F.R.D. at 38 ("[A] notice of deposition . . . constitutes the minimum, not the maximum, about which a deponent must be prepared to speak.").

(4) the availability of alternative methods of discovery in lieu of a corporate representative deposition that is less burdensome and more efficient for the parties;

(5) numerical limits on corporate representative topics beyond the presumptive limit (if drafted by the Subcommittee);

(6) an objection or motion procedure for resolving disputes;

(7) the discoverability of materials reviewed in preparation for the deposition;

(8) supplementation following the corporate representative deposition;

(9) reducing or eliminating depositions that will produce redundant or cumulative testimony.

Including these subjects in the rule will significantly raise the likelihood that consulting parties will confer about the most important aspects of the deposition, and will also provide the court, if needed, a measuring stick by which to gauge cooperation and compliance.

## IV. ADDING A REFERENCE TO RULE 30(b)(6) IN RULES 16 AND 26 WOULD ADD MATERIALLY TO A CONSULTATION REQUIREMENT BY ENABLING EARLY JUDICIAL INVOLVEMENT.

Even though the Subcommittee has preliminarily concluded that Rule 30(b)(6) is the appropriate location for a new consultation requirement, it should revisit the modest idea of including a reference to Rule 30(b)(6) in rules 16 and 26 in order to invite early judicial involvement as appropriate. Rule 30(b)(6) depositions are an important component of many discovery plans. Even though they can occur at different points in different cases, a rule change that adds 30(b)(6) to Rules 16 and 26 could serve spark early judicial oversight and preclude later disputes—ideas that are consistent with the 2015 FRCP amendments, which were "a major stride toward a better federal court system."[7]

## V. CONCLUSION

A bare consultation requirement in Rule 30(b)(6) will fail to achieve the Subcommittee's goals unless it is accompanied by sufficient parameters that give both the sender and recipient a stake in the consultation. Presumptive limits on the number of topics would be a modest, well-accepted tool to foster meaningful discussions. A targeted list of key topics to be discussed is also vital to ensuring serious participation. And, although the Subcommittee is focused on helping parties to work out 30(b)(6) issues without the court, adding a reference to 30(b)(6) in rules 16 and 26 is a simple and effective way to open the door to early judicial management where appropriate.

[7] CHIEF JUSTICE JOHN G. ROBERTS, 2015 YEAR-END REPORT ON THE FEDERAL JUDICIARY 9 (2015).